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Office of Administrative Law Judges
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Case No.'s: 2003-LHC-02741
2003-LHC-02742
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2003-LHC-02744

OWCP No.'s: 18-79385
18-79591
18-79821
18-01112

In the Matter of:

JAMES M. LOPEZ,
Claimant

v.

EAGLE MARINE SERVICES;
MAERSK PACIFIC, LTD., and
SIGNAL MUTUAL INDEMNITY ASSOCIATION;
STEVEDORING SERVICES OF AMERICA, and **HOMEPORT INSURANCE COMPANY.**
Respondents

Appearances: Charles D. Naylor, Esq.
For the Claimant

Daniel L. Valenzuela, Esq.
For the Respondents
Eagle Marine Services

James Aleccia, Esq.
For the Respondents,
Maersk Pacific, Ltd. and Carrier
Stevedoring Services of America and Carrier

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for compensation brought under the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 ("the Act"). The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring on the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. This claim was brought by James Lopez ("Claimant") against Eagle Marine Services ("EMS"), Maersk Pacific Ltd. ("Maersk") and its carrier Signal Mutual Indemnity Association ("Signal"), and Stevedoring Services of America ("SSA") and its carrier Homeport Insurance Company ("Homeport") arising from injuries sustained to his shoulders, knees and elbows while employed as a longshore worker.

On September 4, 2003, the Director, Office of Worker's Compensation Programs ("OWCP"), referred this case to the Office of Administrative Law Judges ("OALJ") for a hearing. The case was assigned to the undersigned on December 3, 2003. A formal hearing was held before the undersigned on April 12-13, 2004, and on April 16, 2004 in Long Beach, California, at which time all parties were afforded a full and fair opportunity to present evidence and arguments. Administrative Law Judge Exhibits ("AX") 1-5, Claimant's Exhibits ("CX") 1-38 and 40, EMS's Exhibits ("EMSX") 1-8, and Maersk and SSA's Exhibits ("SSAX") 1-24, except pages 246-252 were admitted into the record. Claimant, Sharon Lopez, Patrick Veale, Allen Bates and Dr. James London testified at the hearing. The depositions of David Rivera and George Sallas were taken after the hearing and admitted into the record.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

Stipulations

The parties stipulate and I find:

1. An employer/employee relationship existed as between Claimant and Employer during the relevant periods.

2. Coverage under the Act exists as to the claims against Employer.

3. The alleged injuries are unscheduled.

4. Respondents are not currently providing compensation or medical benefits.

Issues

The remaining issues to be resolved are:

1. Whether notice was timely filed.
2. The identity of the last responsible employer.
3. Date of maximum medical improvement.
4. The nature and extent of Claimant's disability.
5. Entitlement to medical expenses.
6. Assessment of attorney's fees and costs.
7. Interest on past due benefits, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the Evidence

The Claimant, James Lopez, was born on April 3, 1963. Hearing Transcript ("TR") at 57. In 1982, he sustained an injury to his left knee while working as a deckhand for Motor Vessel Sport King. TR 50-51; Claimant's Deposition Transcript ("SSAX 19" at 272). He required two surgeries as a result of the accident. TR 49-50. Claimant filed a lawsuit under the Jones Act and was awarded $8000 in compensation for his injuries. SSAX 19 at 273.

In 1994, he began working as a casual longshoreman and became a member of the Longshore Union in May of 1998. TR at 57. In 1999, Claimant began operating top handlers, heavy vehicles used to stack and unstack containers. TR at 60. Operators must climb steps to get into and out of the cab at least eight times a shift. When lifting containers, the brake and accelerator pedals must be pressed forcefully to engage them. TR at 67. Hand motions at or below shoulder level are also necessary when operating the controls. TR at 78. Steering top handlers require force as well. TR at 79. During the course of his work, Claimant began experiencing pain in his shoulders and knees. TR at 62. Steering and operating the controls caused severe pain in his shoulders and at times, he would wake up with numbness or tingling in both arms or no feeling at all. TR at 88. The repetitive force used to hit the brake and accelerator affected his knees, as they began to swell after each shift. TR at 89.

In June of 2000, Claimant saw Dr. Gold for his complaints. [1] Dr. Gold prescribed Celebrex for inflammation, a knee brace and cortisone injections in his shoulders. TR at 91.

[1] Dr. Gold, a board certified orthopedic surgeon, specializes in knees, shoulders, complex tibial fractures and has performed a few hip replacements. CX 38 at 378.

On November 29, 2001, Claimant suffered an injury while working as a top handler for EMS. As he was driving the top handler he used force to apply the brakes. TR at 93. His left knee popped out of place causing him to run into a stack of loaded containers. *Id*. Claimant finished his shift and reported the incident to his foreman. *Id.* He did not file an accident report. SSAX 19 at 282. Following the incident Claimant decided he could no longer continue to work as a top handler because the work was too painful and he feared he might injure someone. TR at 93.

Claimant started driving UTR's, trucks used to move containers, chassis, and bomb carts around the yard. TR 62. The job required a full six hour shift of driving. TR at 97. He climbed in and out of trucks at least four to six times per shift. *Id*. The same amount of force used to engage the brake and accelerator in top handlers was necessary in UTR's. TR at 98. He had to hook up the chassis to the UTR and constantly open the door to unhook the glad hands that operate the brakes for the chassis. TR at 100. This required squatting down to pull off or put on the glad hands. TR at 100. Claimant testified there were numerous potholes on the docks and his "body took a pounding just driving over the dock". TR at 232. Additionally, bouncing around the yard when he hit the brake and getting up and down to adjust the glad hands caused more knee problems. TR at 106.

On December 3, 2001, Claimant suffered a second injury while working as a UTR driver at EMS. The UTR he was operating hit a hole causing the steering wheel to kick back and Claimant to twist his arm and shoulder. TR at 223. Claimant sought treatment with Dr. Sliskovich, his treating family physician, for his injuries. He was diagnosed with a right shoulder and right elbow sprain and prescribed physical therapy and Celebrex. TR at 224. Claimant stopped driving UTR's on January 6, 2002 because the work became too painful. TR at 106. On January 7, 2002, Claimant obtained light duty work through the casual board. *Id*.

Claimant performed signal and clerking duties on the casual board from January 7, 2002 through April 8, 2003. TR at 108. Signal work was also strenuous as it required constant standing, walking and use of arms at or above shoulder level to signal crane and UTR drivers. TR at 115. The continuous standing and repetitive movement of both arms caused great physical discomfort in Claimant's knees and shoulders. TR at 109 and 114. In addition to his signal duties, Claimant often helped out with the cones, which required lifting and twisting his arms at or above shoulder level. TR at 115.[2] Clerking duties involved driving a truck with no power brakes or steering to pick up magnets, and reaching to the passenger side of the cab to input information into computers. TR at 191-2. The position also required gate work, which involved continuous standing and walking. TR at 194. Claimant tolerated clerking activities better than signal duties because he was able to sit most of the time.

On October 10-14, 2002, Claimant performed signal work for Maersk, working six and a half hour shifts for five straight days. TR at 120-121. The symptoms in Claimant's knees and

[2] Cones are interlocking pieces of metal that lock containers together. The removal of cones entails reaching out with both hands at or above shoulder level and picking up and throwing the 10-15 pound metal cone into a basket. While handling cones is the job of the swingman, Claimant testified it is common for signalmen to help with the removal of cones. TR at 293-4.

shoulders increased and the pain he experienced during those five days was worse than it had ever been previously. TR at 302-303. He was unable to work for the next three days. TR at 120.

On October 17, 2002, Claimant was examined, by Dr. Delman. Deposition Transcript of Dr. Delman (CX 37 at 356); CX 24 at 140.[3] Claimant complained of severe pain in both shoulders as well as pain in both legs and elbows. CX 24 at 140. Dr. Delman opined Claimant exacerbated his symptoms as a result of his recent activities and placed him on temporary total disability for two days. *Id.* Claimant mentioned he was ready to consider surgery on his shoulders and treatment for his knees, procedures previously recommended by Dr. Delman. *Id*.

In November of 2002, Maersk received from Claimant, a Longshore Act form LS-203 claim for benefits. The form was dated November 1, 2002 and sought compensation for continuous repetitive trauma to Claimant's right and left shoulders, knees and elbows. The date of injury was represented to be October 15, 2002. SSAX 1 at 4.

During a February 28, 2003, examination with Dr. Gold, Claimant made the decision to proceed with shoulder surgery. CX 38 at 392. Dr. Gold received authorization for Claimant's right shoulder surgery from Claimant's private health insurance company in March of 2003. Claimant's surgery was scheduled for April 10, 2003. SSAX 14 at 179.

On March 10, 2003, Claimant was examined by Dr. London. SSAX 7 at 27; SSAX 21 at 357. Dr. London opined Claimant exacerbated his symptoms as a result of his work activities at Maersk but did not sustain an aggravation or worsening of his previous condition. SSAX 7 at 37. Dr. London opined Claimant's need for ongoing treatment was related to conditions present prior to October 10, 2002. *Id*.

Claimant's last day of Employment before his right shoulder surgery was on April 8, 2003. SSAX 19 at 279. On that date, he worked for SSA, which hired him as a signalman. *Id.* In addition to the usual duties of signaling crane and UTR drivers, and continuous standing, Claimant also helped with the cones.[4] He stood throughout his entire five hour work shift. SSAX 19 at 280. At the end of the shift, he felt severe pain in both shoulders, knees and elbows. *Id.* at 281. Although, there was no specific injury or incident that occurred on April 8th, his symptoms increased. *Id.* at 279; TR at 132. Claimant did not report the injury to the foreman or supervisor at SSA, nor did he seek a medical authorization slip. SSAX 19 at 282-3.

On April 10, 2003, Claimant underwent right shoulder surgery performed by Dr. Gold. TR at 196; CX 19 at 92.

Claimant was examined by Dr. Gold on April 17, 2003. CX 18 at 80. He was feeling much better with respect to his right shoulder, but symptoms in his left shoulder and both knees were increasing. *Id.* at 81. In his medical report, Dr. Gold opined Claimant suffered a cumulative

[3] This was Claimant's last examination with Dr. Delman, as his medical care and treatment was transferred back to Dr. Gold.

[4] Allen Bates, the terminal manager at SSA, testified that he is not aware of and has never witnessed a signalperson handling cones on the dock. TR at 505. However, George Sallas, Steady Ship Boss for SSA, testified he has seen signalmen taking off the cones on a regular basis to help out.

trauma injury to his shoulders, right elbow and both knees, which was initially reported on November 29, 2001. *Id.* at 89. Claimant's condition became further aggravated by his work duties in January and October of 2002. *Id.* at 90. Dr. Gold concluded an accumulation of the three injuries ultimately caused Claimant's current disability with the more significant portion occurring on November 29, 2001, aggravation noted on January 6, 2002, and a further albeit small aggravation noted in October of 2002. *Id*.

Claimant's left shoulder surgery was performed by Dr. Gold on June 10, 2003. CX 20 at 95; SSAX 10 at 73. Claimant's last employer before this event was SSA on April 8, 2003.

On September 23, 2003, Claimant underwent laparoscopic banding surgery to lose weight in preparation for his impending knee surgeries and to increase the longevity of the knee replacements. SSAX 19 at 296.[5]

On June 27, 2003, SSA received from Claimant, a form LS-203 claim for benefits. The form was dated June 18, 2003 and sought compensation for continuous repetitive trauma to Claimant's right and left shoulders, knees and elbows. The date of injury was represented to be April 8, 2003. SSAX 1 at 2.

In January of 2004, Claimant's knee popped out of place and locked, causing him to fall in his kitchen. TR at 182. His knee eventually popped into place forty-five minutes later. TR at 182. Claimant did not seek medical attention because he had no increase in pain or his symptoms. TR at 186. Dr. London testified the knee locking incident was significant because the locking of the knee and subsequent popping back into place causes cartilage to get caught between the ends of the bones on the femur and the tibia and can do damage to the cartilage as it pops back into place. TR at 409. Dr. Gold, on the other hand, opined the incident was not significant because there was no knee dislocation or increased swelling and Claimant's range of motion was exactly the same as it was on December 2, 2003. CX 38 at 390.

On February 19, 2004, Claimant was examined by Dr. Peter Newton, a board certified orthopedic surgeon. SSAX 6 at 13; SSAX 21 at 362. Based on the examination and a review of Claimant's medical records, Dr. Newton opined Claimant's work activities between October 15, 2002 and April 8, 2003, did not permanently aggravate, worsen or accelerate his pre-existing underlying orthopedic condition. SSAX 6 at 22. Dr. Newton further noted that Claimant's discussion of surgery with Dr. Delman in August of 2002 and decision to undergo surgery several months prior to the alleged continuous trauma claim demonstrated the need for surgery prior to his activities in October of 2002. *Id*. Dr. Newton ultimately opined Claimant's condition was due to the natural progression of his pre-existing injuries pre-dating October 15, 2002 and approved his return to work as a marine clerk. *Id*.

On February 23, 2004, Claimant underwent left knee surgery, performed by Dr. Gold. CX 21 at 98; SSAX 19 at 296. Dr. Gold testified Claimant's left knee surgery was due to his employment as a longshoreman through April 8, 2003, as opposed to the knee popping incident

[5] Claimant testified that between April 10, 2003 and September 23, 2003 he was unable to return to light duty work on the casual board due to continued pain in his knees. TR at 197.

of January 2004. At the time of trial, Claimant planned to have right knee surgery following the full recovery of his left knee.

Claimant was examined by Dr. London on March 29, 2004. TR at 406. Dr. London opined Claimant's one day of employment at SSA on April 8, 2003 did not aggravate or worsen the bilateral shoulder, knee or right elbow condition.

Dr. Gold's deposition testimony corroborates Claimant's trial testimony as he opined Claimant's work related activities as a longshoreman through April 8, 2003 contributed to the need for his right and left shoulder surgeries. CX 38 at 392. Dr. Gold testified the type of steering Claimant performed as a top handler contributed to the progression of his impingement syndrome because the combination of the size of the wheel, radius curvature, and the rotation and repetitive motion that is required to operate the vehicle will induce that type of potential trauma to the shoulder and cause impairment. CX 38 at 380. Dr. Gold opined Claimant's operation of UTR's as another contributing factor as the rotational motion that occurs causes pressure in the subacromial region of the shoulder. *Id*. Dr. Gold also indicated Claimant's work as a signalman through April 8, 2003 contributed to Claimant's shoulder condition. *Id*. Such activities as repetitive pointing overhead or flag holding at or above shoulder level, even if he is not lifting anything, put added stress in the subacromial region and contributed to the end stages of the disease process. *Id.* at 381.

Dr. Gold testified that Claimant's work activities as a longshoreman also contributed to the arthritis and the progression of arthritis in his knees. CX 38 at 380-381. While Claimant's prior left knee injury in 1982 was a small component that contributed to his arthritis, Claimant's weight and work activities played a larger role in the progression of the disease. CX 38 at 383.[6] Dr. Gold testified the repetitive and forceful flexion and extension used to engage the pedals of a top handler and UTR damaged and gradually wore down the knee cartilage. *Id*. Climbing in and out of the UTR also contributed to the development of arthritis. CX 38 at 384. Furthermore, the continuous standing done while signaling, in combination with his weight also added stress to the knees and contributed to the continued progression. *Id*.

Dr. Delman also opined the signal work performed by Claimant contributed to his orthopedic condition to some degree. CX 37 at 374. Dr. Delman stated that repetitive signaling overhead to cranes and truck drivers, and standing for five consecutive hours are all activities that contribute to the orthopedic problems Claimant had in his knees and shoulders. *Id.* at 374.

Dr. London testified that Claimant's top handler and UTR activities aggravated his underlying orthopedic condition but not Claimant's signal duties. Dr. London opined Claimant's signal activities were merely an exacerbation of symptoms rather than an aggravation of the underlying condition. TR at 445.

Patrick Veale, the vice president and regional claims manager of Homeport testified he first gained knowledge and notice of an injury claim against SSA on June 18, 2003. TR at 475-

[6] Dr. Gold testified Claimant's previous left knee surgery in 1982, created a 10% chance that it would be a predisposing factor to arthritis. CX 38 at 382.

6. He was not afforded an opportunity to authorize or decline authorization for the April 10, 2003 or the June 10, 2003 shoulder surgeries. TR at 476-7. On July 2, 2003, after investigating the alleged injury, he rejected the claim for lack of medical evidence establishing a connection between Claimant's employment with SSA on April 8th, and his alleged disabling condition. TR at 486.

Claimant has not worked in any capacity as a longshoreman since April 8, 2003 and was placed on disability until February 1, 2005. SSAX 19 at 294. In addition to his longshore duties, Claimant has operated a computer business since 1999. SSAX 19 at 324. Claimant performs system integration, software setup, updating, and maintenance of computers. TR at 135-6; SSAX 19 at 329. There is no physical aspect to the work performed and the activities do not increase Claimant's shoulder symptoms. *Id*. His general contractor, Peter Olenczuk, performs the heavy work, such as pulling cables and wires, and installing the computers. TR at 140; SSAX 19 at 337. Claimant's 2003 annual income from his computer business was approximately $10,000. SSAX 19 at 325. He currently has no other source of income, but receives $602 a week in state disability payments and a $125 supplement from the ILWU. SSAX 19 at 325.

II. Discussion of Law and Facts

Last Responsible Employer

The Ninth Circuit recently reaffirmed that under the "Last Responsible Employer Rule," a single employer may be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries the worker suffered while working for more than one employer. *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co., et. al.,* 339 F.3d 1102, 1104 (9th Cir. 2003); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978). The claimant's last employer is liable for all compensation due, even though prior employment may have contributed to the disability. *Metropolitan Stevedore Co.*, 339 F.3d at 1105; *Foundation Constructors Inc. v. Director, OWCP,* 950 F.2d 621, 623 (9th Cir. 1991).

The Ninth Circuit has applied the Last Responsible Employer Rule distinctly depending on whether the disability is an occupational disease, such as asbestos, or the result of multiple or cumulative traumas. *Metropolitan Stevedore Co.*, 339 F.3d at 1105; *Foundation Constructors*, 950 F.2d at 624. If the disability is an occupational disease, the responsible employer is the employer which last exposed the worker to the injurious stimuli prior to the date the worker became aware of suffering from the occupational disease. *Metropolitan Stevedore Co.*, 339 F.3d at 1105. In contrast, under the rule which applies in traumatic injury cases, the identity of the last responsible employer depends upon the cause of the worker's ultimate disability. On one hand, if the worker's ultimate disability is the result of the natural progression of a traumatic injury and would have occurred notwithstanding the subsequent injury, the employer that employed the worker on the date of the initial injury is the responsible employer. On the other hand, if the worker's disability is at least partially the result of a new traumatic injury that aggravated, accelerated or combined with a prior injury to create the ultimate disability, the employer that employed the worker at the time of the new injury is the responsible employer. *Foundation Constructors*, 950 F.2d at 624.

In the instant case, the injury was caused by cumulative trauma and thus the responsible employer is the last employer to have subjected the Claimant to trauma that combined with, aggravated or accelerated his pre-existing bilateral shoulder, knee and elbow conditions. While the parties agree that this is the proper standard, they disagree on how the standard should be applied to the facts of this case. Claimant and EMS argue that SSA was the last employer to have subjected Claimant's shoulders, knees and elbows to cumulative trauma and that it is therefore the last responsible employer. On the other hand, Maersk and SSA contend Claimant's disability is the result of the natural progression of the traumatic injuries that occurred while working for EMS in November and December of 2001.

Based on a review of the relevant case law and careful analysis of the record, the undersigned agrees with Claimant and EMS and finds SSA was the last employer to have subjected Claimant's shoulders, knees and elbows to cumulative trauma and is therefore the last responsible employer. First, Claimant's employment with SSA on April 8, 2003, aggravated and accelerated Claimant's bilateral shoulder, knee and elbow conditions. On April 8th, Claimant duties as a signalperson required prolonged standing throughout his entire five hour shift, as well as repetitive use of his arms at or above shoulder level to signal both crane and UTR drivers. TR at 115. In addition to his signal duties on this day, Claimant helped remove cones, weighing 10-15 pounds, from containers which also required the repetitive use of both hands at or above shoulder level. Claimant testified by the end of the day the pain had increased in his shoulders and knees. TR at 132; SSAX at 279.

Dr. Gold and Dr. Delman confirmed Claimant's testimony as they credibly testified that signal work contributed to the progression of Claimant's shoulder and knee conditions. CX 37 at 374; CX 38 at 384. According to Dr. Gold, pointing overhead, working at or above shoulder level, combined with existing symptoms, puts added stress on the shoulders and can contribute to the progression of the impingement syndrome in the shoulders. CX 38 at 380. Continuous standing, in combination with Claimant's weight also added stress to the knees and contributed to the continued progression. *Id*. at 384. Like Dr. Gold, Dr. Delman also testified that repetitive signaling overhead to cranes and truck drivers and standing for five consecutive hours are all activities that contributed to the orthopedic problems Claimant suffered in his shoulders and knees. CX 37 at 374.

The testimony by both Dr. London and Dr. Newton that Claimant's signal duties on April 8th, did not permanently aggravate, worsen or accelerate his pre-existing underlying condition is not convincing. TR at 445; SSAX 6 at 22. While there may not have been a significant accident or deterioration in Claimant's overall status on April 8th, there was an increase in pain caused by continued and strenuous work activities. Claimant's testimony of increased pain, and his treating physician's testimony that signal work can worsen an already compromised orthopedic condition allows for the belief that trauma and aggravation continued without necessarily a deterioration in the disease process itself. Furthermore, Dr. London and Dr. Newton's testimony is inconsistent with the testimony of Dr. Delman and Dr. Gold, Claimant's former and current treating physicians. As such, Dr. Gold and Dr. Delman's opinions are entitled to special deference, as they are employed to cure and have a greater opportunity to know the patient as an individual. *Amos v. Director, OWCP*, 151 F.3d 1051 (9th Cir. 1998). Therefore, the strenuous work

activities performed on April 8th at SSA, reasonably contributed to and aggravated Claimant's orthopedic condition.[7]

Second, Respondent's argument that Claimant's knee locking incident in January of 2004, was a superseding event that worsened Claimant's condition and increased the need for knee surgery is not persuasive. SSA offered the testimony of Dr. London, who opined the knee locking incident was "significant" because damage could be done to the cartilage when the knee was popped back into place, and this could be a permanent worsening of the underlying condition. TR at 409-410. However, SSA was unable to show that any damage resulted. On the other hand, Dr. Gold, who examined Claimant following the incident, testified the incident was not significant because there was no increased knee swelling or evidence of dislocation. CX 38 at 390. Furthermore, Claimant's range of motion was exactly the same as it was on December 2, 2003. *Id*. Dr. Gold's opinions are corroborated by Claimant, who testified he had no increase in pain or symptoms as a result of the incident. TR at 186. Therefore, the knee locking incident was not a superseding event as SSA failed to successfully establish the incident aggravated Claimant's condition.

Lastly, although assignment of liability to SSA by the Last Responsible Employer Rule may seem unfair, the Ninth Circuit established this bright line rule to avoid the difficulties and delays connected with trying to apportion liability among several employers. *Metropolitan Stevedore Co.,* 339 F.3d at 1107. The rule allows the apportionment of liability in an equitable manner, since all employers will be the last employer a proportionate share of the time. *Id; Foundation Constructors Inc.,* 950 F.2d at 623. The undersigned finds no reason to depart from this bright line rule.

Therefore, the undersigned finds substantial evidence in the record supports a finding that SSA was the last employer to have subjected Claimant to trauma that aggravated and accelerated his underlying bilateral shoulder, knee and elbow conditions, and is liable for the totality of Claimant's disability.

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty days (30) after the employee or beneficiary is aware of a relationship between the injury or death and the employment. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. *Osmundsen v. Todd Pacific Shipyard*, 755 F.2d 730, 732-33 (9th Cir. 1985); *Cox v. Brady Hamilton Stevedore Company*, 18 BRBS 10 (1985); *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983); *Stark v. Lockheed Shipbuilding and Construction Co.*, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the

[7] Even though Claimant was in need of surgery before his last day of work, the evidence clearly demonstrates that the increased pain Claimant suffered as a result of his signal activities on April 8th, increased the need for such surgery.

injury, employment and disability. *Thorud v. Brady-Hamilton Stevedore Company*, 18 BRBS 232 (1986). *See also Bath Iron Works Corporation v. Galen*, 605 F.2d 583 (1st Cir. 1979); *Geisler v. Columbia Asbestos, Inc.,* 14 BRBS 794 (1981).

Section 12(d) specifies the circumstances when failure to give notice under Section 12(a) will not bar a claim. Under Section 12(d) as amended in 1984, 33 U.S.C. § 912(d), which is applicable to this case, the failure to provide timely written notice will not bar the claim if claimant shows either that employer had knowledge during the filing period (subsection 12 (d) (1)) or that employer was not prejudiced by the failure to give timely notice (subsection 12(d)(2)). *See Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986) (Decision and Order on Reconsideration), modifying 18 BRBS 1 (1985); *Derocher v. Crescent Wharf & Warehouse*, 17 BRBS 249 (1985); *Dolowich v. West Side Iron Works*, 17 BRBS 197 (1985).

In the present case, Claimant did not file written notice of his April 8, 2003 injury until June 27, 2003, more than two months after the alleged date of injury at SSA. SSAX 1 at 2. SSA did not have knowledge of the claim being related to Claimant's signal activities until the filing of the LS-203 on June 27th. Claimant asserts he filed his claim the moment his doctors explained the work related nature of his long term degeneration and his lawyers explained the last responsible employer rule. CX 1 at 2; SSAX 3 at 7. While SSA argues Claimant knew or should have known that his injuries were work-related on April 8, 2003, there is no evidence in the record supporting this contention.[8] The regulations explicitly provide that timely notice coincides with the date the employee became aware of a relationship between the injury and the employment. 33 U.S.C. §912. In the instant case, the statute of limitations did not commence until on or around June 18, 2003, which is the date on the LS-203 claim form, and according to Claimant the date he became aware of the relationship between his injury and signal duties on April 8, 2003. Since Claimant gave notice of injury to SSA on the date he became aware of the relationship, the undersigned finds that Claimant timely notified SSA of his work related injuries.

Assuming arguendo, that Claimant failed to give timely notice, SSA has not shown prejudice as a result thereof. Prejudice under Section 12(d)(2) is established where the employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the illness or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden of proof. *Bustillo v. Southwest Marine, Inc*., 33 BRBS 15 (1999); See *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62 (CRT) (9th Cir.1998), cert. denied 119 S.Ct. 866 (1999); *ITO Corp. v. Director, OWCP* [Aples], 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir.1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 233 (1990).

SSA argues the untimely notice precluded it from obtaining a second opinion or conducting an independent medical examination prior to Claimant undergoing two surgeries.

[8] Although, Claimant testified there was an increase in his symptoms following his work activities on April 8, 2003, he failed to mention this information to his doctor prior to his April 10, 2003 surgery. SSA questions how Claimant could omit such information to his doctors, as it would seem helpful for diagnosis and treatment. However, Claimant's omissions are not at issue here. At issue is the date he became aware that his injury was work-related.

SSA contends a pre-operative exam could have assisted in severing a presumed connection between Claimant's condition and work activities on April 8, 2003. SSA also argues it was unable to depose Claimant prior to surgery and unable to timely ascertain and interview witnesses as to Claimant's work activities while the matter was fresh.

The undersigned finds that even if the notice was untimely, SSA was not prejudiced. First, SSA would not have discovered anything new had it conducted an independent medical examination prior to Claimant's surgeries. Claimant's orthopedic condition was the result of cumulative trauma beginning November of 2001 and continuing through April 8, 2003. Claimant testified that as a result of his activities on April 8th, he felt an increase in his symptoms. By April 8th, Claimant was already in the end stages of his disease. The undersigned finds it very unlikely that a medical examination the day before surgery would have shown a marked difference from Claimant's pre-operative examination on April 4, 2003 or even his examination on March 10, 2003, conducted by Dr. London. Furthermore, there is no question as to causation as the evidence clearly reflects Claimant's signal activities aggravated and contributed to his orthopedic condition and the end stages of the disease process. CX 37 at 374; CX 38 at 380-381. Therefore, the undersigned finds no prejudice in SSA's inability to conduct an independent medical examination prior to Claimant's surgeries.

Second, SSA's conclusory allegation that delayed notice prevented them from deposing Claimant and timely ascertaining and interviewing witnesses while the matter was still fresh, is unsupported by evidence in the record. SSA clearly had an opportunity to adequately conduct its investigation as shown by the presentation of its defense at the hearing. Therefore, SSA has shown no prejudice in its ability to investigate the claim.

Lastly, although SSA relies on *Kashuba*, it is distinguishable from the present case. The Ninth Circuit in *Kashuba*, concluded the employee's untimely notice precluded the employer from promptly investigating the accident's relationship to the employee's history of back problems and from obtaining a second opinion prior to surgery. *Kashuba*, 139 F.3d at 1274-5.
In Kashuba, the employee suffered a non-work related automobile accident that left him bedridden for several months and unable to work for three years. The significant nature of the prior accident, naturally raised doubt as to the extent a later lifting incident had on the employee's back condition. The present case is distinguishable from *Kashuba*, as Claimant's prior knee injury in 1982 was only a small component that contributed to the arthritis in his knee, and was insignificant as to Claimant's shoulder condition. Moreover, the record is quite clear that an accumulation of traumatic injuries stemming from Claimant's longshore activities ultimately caused his current disability. Each job, whether as a top handler operator, UTR driver or signalman, contributed to and further aggravated Claimant's condition. While the medical evidence indicates his signal activities resulted in small aggravations, they are nonetheless aggravations that furthered the progression of his condition. Therefore, reliance on *Kashuba* is erroneous as the case is distinguishable.

Accordingly, the undersigned finds that even if notice were untimely filed, SSA has failed to meet its burden of proving that it was prejudiced by Claimant's delay.

Maximum Medical Improvement

An injured worker's impairment under the Act may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI". *James v. Pate Stevedoring Co.,* 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *see also SGS Control Services v. Director, OWCP*, 86 F. 3d 438, 443-44 (5th Cir. 1996). Any disability before reaching MMI would be temporary in nature. *Id*. The date of maximum medical improvement is defined as that time at which the employee has received the maximum benefit of medical treatment such that his condition will not further improve. The determination of the date of MMI is primarily medical and does not rely on economic or vocational considerations. *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.,* 20 BRBS 184, 186 (1988); *Manson v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984). Medical evidence must establish the date at which the employee has received the maximum benefit from medical treatment such that his condition will not further improve. *Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56, 60 (1985). Accordingly, the determination as to when maximum medical improvement has been reached, so that a claimant's disability may be termed "permanent," is primarily a question of fact based upon medical evidence. *Lozada v. Director, OWCP*, 903 F. 2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988).

At issue here are the dates on which Claimant's bilateral shoulder, knee and elbow conditions reached maximum medical improvement. In evaluating this issue, generally the opinion of the claimant's treating physician is to be accorded greater weight since the physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *See Amos,* 153 F.3d at 1054.

Based on the medical evidence provided in the record, the undersigned finds Claimant's bilateral shoulder condition reached maximum medical improvement on December 10, 2003, approximately six months after his left shoulder surgery. Dr. Gold, Claimant's treating physician, testified that Claimant's right and left shoulder reached maximum medical improvement or permanent and stationary status on December 10, 2003. CX 38 at 393. Dr. Gold opined Claimant recovered very quickly from both shoulder surgeries and would be able to return to his duties as a marine clerk and signalman. *Id.* Claimant's only work restrictions were no frequent to constant overhead work. *Id*. The undersigned accepts Dr. Gold's testimony and finds Claimant's bilateral shoulder condition reached maximum medical improvement on December 10, 2003.

Although Claimant's bilateral shoulder condition has reached maximum medical improvement, Claimant continues to be temporarily totally disabled as he is unable to return to work due to his bilateral knee condition. On February 23, 2004, Claimant underwent left knee surgery, and at the time of trial, planned to have right knee surgery following the full recovery of his left knee. CX 21 at 98. Because Claimant remains under active medical care for his bilateral knee condition, and has been unable to return to his longshore duties, he continues to be temporarily totally disabled.

Therefore, the undersigned finds that although Claimant's bilateral shoulder condition reached maximum medical improvement on December 10, 2003, he remains temporarily totally disabled until such time as his disability status shall cease or otherwise be modified.

Compensation

Thus, I find Claimant is entitled to temporary total disability commencing on April 9, 2003 until such time as that status ceases. Claimant's average weekly wage was $2129.70, based on earnings of $110,744.25, in the 52 weeks ending April 4, 2003. Claimant's compensation rate based on those earnings would be $996.54. Accordingly, SSA shall compensate Claimant for temporary total disability commending April 9, 2003 at the rate of $966.54 per week, until such time as his disability status shall cease or be otherwise modified.

Entitlement to Medical Expenses

Claimant seeks compensation for medical expenses related to his bilateral shoulder, knee and elbow condition. However, SSA argues it is not liable for the costs of Claimant's medical care and treatment, as his treatment was self-procured.

Under Section 7(a) of the Act, reasonable and necessary medical expenses incurred since the industrial injury may be assessed against the employer. 33 U.S.C. §907(a); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. §702.402; *Pardee v. Army & Air Force Exch. Serv.,* 13 BRBS 1130, 1138 (1981). However, an employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. §702.421; *Shahady v. Atlas Tile & Marble Co.,* 682 F.2d 968 (D.C. Cir. 1982) (per curium), rev'g 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

The record establishes that all of Claimant's medical care, including right and left shoulder surgery, laparoscopic adjustable gastric banding surgery, and left knee total replacement surgery has been provided by Claimant's private health care provider, the ILWU-PMA Welfare Plan. Although, Claimant failed to seek authorization for his shoulder surgeries prior to the procedures, SSA was not prejudiced. The undersigned finds it very unlikely that requests for authorization prior to Claimant's surgeries would have made a difference. Therefore, the undersigned finds SSA is liable for all outstanding medical bills related to Claimant's disability and shall furnish reasonable, appropriate and necessary medical care and treatment as required by Section 7 of the Act.

Interest

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 556, 559 (1978), *aff'd in part, rev 'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v.*

S.E.L. Maduro, 26 BRBS 147 (1992); Byrum v. Newport News Shipbuilding & Dr Dock Co., 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co*., 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation amounts due and owing by SSA should be included in the District Director's calculations of amounts due under this decision and order.

Attorney's Fees and Costs

Thirty (30) days is hereby allowed to Claimant's counsel from the submission of such an application. See 20 C.F.R. 702.132. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED**, that:

1. SSA shall pay Claimant compensation for temporary total disability for the period commencing April 9, 2003, until such time as his disability status shall cease or otherwise be modified.

2. Pursuant to Section 7 of the Act, SSA shall pay all outstanding medical bills related to Claimant's disability and shall furnish reasonable, appropriate and necessary medical care and treatment as required by Section 7 of the Act.

3. SSA shall pay interest on the above sums as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

A

Russell D. Pulver
Administrative Law Judge